

Before the
Federal Communications Commission
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Streamlining Broadcast EEO Rules)
and Policies, Vacating the EEO)
Forfeiture Policy Statement and)
Amending Section 1.80 of the)
Commission's Rules to Include)
EEO Forfeiture Guidelines)

MM Docket No. 96-16

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To: The Commission

CONSOLIDATED REPLY COMMENTS

The Illinois Bible Institute (IBI); Southwest Florida Community Radio, Inc. (Southwest); Side By Side, Inc.; Radio Training Network, Inc. (RTN); and Eastern Shore Broadcasting, Inc. (ESB) (all hereinafter referred to as "Commentors") file these reply comments. By Order DA96-1594 released September 20, 1996, the reply comment date was extended until October 25, 1996. Except for ESB, Commentors are the licensees of noncommercial educational stations.¹

These reply comments are filed in support of amending the Commission's current EEO rules to ease the administrative burden on broadcast licensees. Specifically, Commentors support: (1) exempting stations with fewer than 10 full-time employees; (2) exempting stations in markets with

¹ IBI is the licensee of NCE stations WIBI-FM, Carlinville, Illinois; WPGL-FM, Champaign, Illinois; WNLD-FM, Decatur, Illinois; WCIC-FM, Pekin, Illinois; WSCT-FM, Springfield, Illinois; WCRT-FM, Terre Haute, Indiana; and is the licensee of commercial station WRVY-FM, Henry, Illinois. Southwest is the licensee of noncommercial stations WAYJ-FM, Fort Myers, Florida; WAYG-FM, Sarasota, Florida; WAYF-FM, West Palm Beach, Florida; and WAYM-FM, Columbia, Tennessee. Side By Side, Inc. is the licensee of WYSZ-FM, Maumee, Ohio; and the permittee of WYSA(FM), Wauseon, Ohio. RTN is the licensee of noncommercial station WLFJ(FM), Greenville, South Carolina; WJIS(FM), Bradenton, Florida; and WAFJ(FM), Belvedere, South Carolina. ESB is the licensee of WVES(FM), Accomac, Virginia.

minority populations of less than 10 percent; and (3) providing for use of a central job bank. In addition, Commentors propose that religious broadcasters be allowed to adopt religious beliefs as a BFOQ for all station employees. Commentors conclude by arguing that *Adarand*² strongly suggests that the Commission's EEO rules be eliminated.

A. Stations with Fewer than 10 Full-Time Employees Should be Exempt.

Commentors support the many parties proposing that the threshold for compliance with the FCC's EEO reporting requirements be increased to 10 or more full-time employees.³ The current low threshold of five or more full-time employees is unduly burdensome. The fewer the number of station employees, the more critical each employee is to the overall operation of that station. When an employee leaves a small station or is terminated, he or she must be replaced immediately. Compliance with the Commission's EEO policies unduly hinders the station's ability to timely fill a position.⁴ This oftentimes means a station must go without a critical employee for many weeks,

² *Adarand Constructors, Inc. v. Penna* 115 S.Ct. 2097 (1995)

³ Letter from the North Carolina and Virginia Broadcaster Association to the FCC, in *Comments to Proposed Rulemaking 96-16*, (Mark J. Pierce, July 1996). Letter from WGBM-FM to FCC, in *Comments to Proposed Rulemaking 96-16*, at 1 (Phillip J. Robins). Letter from the American Radio Systems to FCC, in *Comments to Proposed Rulemaking 96-16*, at 2 (John R. Feore, July 1996).

⁴ A licensee must: (a) develop a list of referral sources for recruiting women and minorities; (b) develop an initial working relationship with each source; (c) contact each referral source every time there is a job opening at the station; (d) document the referral sources contacted for each job opening during the license term; (e) document for every job opening during the license term whether each referral source produced any referrals; (f) document the name, race/national origin and gender of applicant referred for every job opening by each recruiting source; (g) evaluate the effectiveness of the station's recruitment efforts; (h) develop relationships with new recruitment sources to enhance minority and female referrals; (i) document the race/national origin, gender and referral source of every applicant, interviewee, and hire for each job vacancy; (j) determine the exact number of applicants and interviewees for each job vacancy during the license term and keep sufficient records to document the information; (k) determine the percentage of minority and female applicants and interviewees for each job vacancy during the license term, and keep sufficient records to document the information; (l) keep track of every promotion that occurred during the license term, indicating whether the promotion went to a minority or a woman; (m) explain all instances where promotions went to non-minorities and males; and (n) continually self-assess the effectiveness of the recruiting efforts and document such self-assessment,

having the potential to seriously threaten the economic viability of a station. ESB has, for instance, on several occasions lost sales personnel. Every day without a sales person translates into lost revenues which, in small market radio, can make the difference between a net loss or gain.⁵ Also, management personnel are intimately involved in running many aspects of the day-to-day operation of smaller stations and have far less time to devote to paperwork and the records necessary to demonstrate compliance with the Commission's EEO policies. Furthermore, unlike the larger businesses and stations, small market stations lack the resources to hire personnel to ensure compliance.

Minority Media and Telecommunications raises concerns about a higher threshold.⁶ The concern is that a licensee with multiple stations in the same market could gerrymander its employees between the various stations to ensure that no station employed more than ten employees. These group owners should be permitted the same flexibility as any other station owner in determining the number of employees needed at any given station. However, in order to address the concerns of possible bad faith by a group owner in a single market, the public should be afforded the opportunity to demonstrate bad faith. Perhaps an appropriate standard would include a rebuttable presumption

including every effort made to enhance minority and female recruiting throughout the license term.

⁵ EEO compliance for all businesses that employ 15 or more persons is already well policed by the Equal Employment Opportunity Commission. Its jurisdiction encompasses all companies which employ 15 or more persons, 42 U.S.C. Section 2000(e)(1996). *See generally*, U.S.C. Section 2000, *et seq.* (implementing broad anti-discrimination laws under Civil Rights Act of 1964). It is counter-intuitive that the FCC should impose burdensome EEO compliance requirements on stations with 10 or fewer employees when Congress and the EEOC have determined that it is not warranted.

⁶ Letter from the Minority Media and Telecommunications Counsel to FCC in *Comments to Proposed Rulemaking 96-16*, at 14-15 (David Honig, April 1996).

of good faith. Any petitioner could, however, present *prima facie* evidence that the organizational structure exists primarily to circumvent EEO compliance.

American Women in Radio and Television claim that exempting stations with ten or fewer employees who would exempt close to 50 percent of all stations.⁷ The focus should be not so much on the percentage of stations exempted, but the number of employees affected. When viewed from the perspective of total employees, the percentage is quite different. The Commission notes in its *Order and Notice of Proposed Rulemaking*, MM Docket 96-16, 11 FCC Rcd 5154, 5164 at n. 34 (1996), that the total number of stations subject to its EEO Rule in 1994 was 13,230 -- 4,239 stations reported having fewer than five employees. Stations with 5 or more employees employed a total of 145,645. Assuming a maximum number of four employees for all nonreporting stations, the total number of employees at stations reporting in 1994 was 145,645 plus (4 x 4,239) or 162,601. The total number of employees for stations with ten or fewer employees equals no more than 37,401. This represents only 23 percent of the total station employee population.

B. Exemption from Minority Labor Force of Less than 10 Percent.

Commentors support the NAB proposal that the threshold minority labor force be increased from 5 to 10 percent.⁸ The smaller the minority labor force in the market, the more difficult it is for a station to recruit minorities. The current threshold of 5 percent requires stations to engage in extensive recruitment efforts and to commit resources to complying with EEO rules with typically

⁷ Letter from the American Women in Radio and Television, Inc. to the FCC in *Comments to Proposed Rulemaking 96-16*, at 9 (Shelley Spencer, April 1996).

⁸ National Association of Broadcasters, at 20.

very little to show for the effort. A 10 percent threshold would more likely ensure that the allocation of resources to comply with EEO requirements would result in minority referrals and hires.

Under any threshold, the criteria used for determining the minority population in a station's market is significant. Some smaller stations are located on the outer fringe of metropolitan areas and thus are required to use the MSA in reporting its labor force. Even though a station is located in an MSA, its signal may not cover the entire MSA, and it may have little success in recruiting minorities who may reside in the city and have little or no desire to commute to the outlying communities where salaries are lower and public transportation is nonexistent.⁹ In addition, the FCC's use of MSA or county data does not necessarily represent a station's employment center.¹⁰ In addition, many of the minorities and women living in an MSA or county, may not be available in the labor pool. Some examples of stations whose MSA's are artificially skewed include: MSA's with military bases, prisons, people lacking necessary education.¹¹ The Commission's current standard for use of an alternative labor force is too restrictive. The licensee must demonstrate a significant distance of the station from areas with significant minority populations in the MSA, commuting difficulties, and the station's inability to attract qualified applicants despite extensive recruitment involving use of minority referral services. *Buckley Broadcasting Corp.*, 9 FCC Rcd. 2099, at ¶17 (1994). The current criteria is far too inflexible.

⁹ Letter from Lakeland Broadcasting Company to FCC in *Comments to Proposed Rulemaking 96-16*, at 1 (Jeanne Kling, May 1996).

¹⁰ *Id.* at 5.

¹¹ *KLAW, supra* at 3.

Commentors support use of work force data that more accurately reflects the minority work force available to a station. Under this proposal, MSA or county data would apply unless a station presents work force data which more accurately reflects the reality of the minority work force available. Stations should be given the flexibility to present any and all relevant information. The Commission then would consider the data provided by the station unless such data was *prima facie*, incorrect, or irrelevant.

C. The Use of Central Job Bank.

Commentors support the proposal to use a central job bank. The job bank would serve as perhaps a primary recruitment source and could serve as a central clearinghouse for all job vacancies as well as potential hires. The benefit to small stations is to eliminate expensive, time-consuming and oftentimes fruitless efforts to recruit from numerous different organizations. The benefit to potential hires is instant exposure to many stations. The central job bank concept is viable only if it is used not only by stations but also by prospective employees. In that regard, the FCC should do all it can to encourage use of job banks. The most obvious clearinghouses are the state broadcast associations.

D. Hiring by Religious Broadcasters.

Religious broadcasters have raised the issue about restrictions placed upon them in hiring persons on the basis of religious faith.¹² The Christian Legal Society (CLS) states that the FCC

¹² See generally, Letter from Christian Legal Society to FCC in *Comments to Proposed Rulemaking 96-16* (Steven McFarland, July 1996), Letter from Center for Individual Rights to FCC in *Comments to Proposed Rulemaking 96-16* (Michael E. Rosman, July 1996), Letter from the National Religious Broadcasters to FCC in *Comments to Proposed Rulemaking 96-16* (Lawrence W. Secrest, April 1996), Letter from the Lutheran Church-Missouri Synod to FCC in *Comments to Proposed Rulemaking 96-16* (Richard Zaragoza, July 1996).

currently uses the *Kings Garden* approach, which allows religious broadcasters to hire based upon religion only in positions that the Commission concludes are directly related to the broadcast message.¹³ CLS states that the policy permits the Commission to second guess who the broadcaster feels is "directly related to its message."¹⁴ Because the Commission currently may second guess a broadcaster's decision, the Commission infringes upon the broadcaster's First Amendment Rights.¹⁵ The Center for Religious Rights states that Free Exercise also requires the FCC to broaden its exemption for religious broadcasters from the current restrictions on religion-based hiring.¹⁶

Commentors believe that the Commission's EEO rules and policies should be clarified to address the needs of "smaller stations and other distinctly situated broadcasters."¹⁷ Commentors support explicit direction by the Commission that religious broadcasters be allowed to make employment decisions based on religious beliefs. Specifically, religious broadcasters should be allowed to adopt religious beliefs as a Bona Fide Occupational Qualification (BFOQ) for all station employees. This would avoid unnecessary governmental and Commission entanglement under the current *Kings Garden* standard. The expanded exemption would not undermine Commission EEO efforts with respect to minorities and women since religious licensees would remain fully subject to the FCC's ban on racial and gender discrimination.

¹³ CLS, *supra*, at 2.

¹⁴ CLS, *supra*, at 2-3.

¹⁵ Center for Individual Rights, *supra*, at 2.

¹⁶ *Supra*, CIR, at 4.

¹⁷ Notice at Paragraph 1.

E. Adarand.

This rulemaking is an opportunity for the Commission to re-assess the applicability of the *Adarand Constructors, Inc. v. Penna*, 0115 S.Ct. 2097 (1995) decision to its EEO rules. As more fully argued in the comments of Golden Orange Broadcasting, *Adarand* supports elimination of the Commission's EEO rules. *Adarand* bars any racial classification unless such classification can pass the strict scrutiny test. The FCC's EEO program can only be upheld if it serves a compelling governmental interest and is narrowly tailored to serve that interest. The Commission's claim that its EEO policies are "efforts based rather than result oriented" does not pass close scrutiny, much less strict scrutiny. The Commission's EEO program is designed to encourage broadcasters to hire minorities as opposed to non-minorities. This is evident by use of EEO numerical processing guidelines, by policies requiring that broadcasters maintain records concerning race and requiring them to make special efforts to attract and interview members of certain races; and by requiring licensees at renewal to report the number of minorities hired and promoted.

The Commission's compelling interest for its EEO policies is the enhancement of "program diversity." However, its EEO policies are not narrowly tailored to serve that interest. In fact, there is no demonstrable proof that its EEO policies help affect diversity of programming at all. Most radio and television programming is market driven and not driven by ownership. Any owner, whether the owner be minority or not, will first ensure that there is a demand or interest in the programming offered very often irrespective of the owners' individual preferences. The owner of a station in a market with an existing urban rock and adult contemporary format station is likely to program that station country if that is the one unavailable format. More importantly, the vast

majority of station employees have little ability, if any, to influence "program diversity."

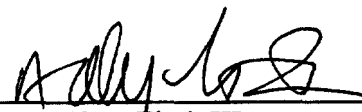
Programming and format are policies almost always set by station owners.

F. Conclusion.

A closer review of the *Adarand* decision may well warrant abandonment of the Commission's EEO policies. Even if the policies are only modified and not abandoned, relief should be afforded, especially to smaller stations from the regulatory burden of compliance.

Respectfully submitted,

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